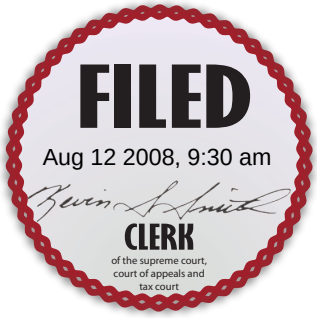

ATTORNEY FOR APPELLANT:

G. TERRENCE CORIDEN
Coriden Law Office, LLC
Columbus, Indiana

ATTORNEYS FOR APPELLEES:

SCOTT M. DILLON
Scott M. Dillon, LLC
Carmel, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SPEEDWAY INTERNATIONAL TRUCKS	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0712-EX-1144
	)	
CLYDE D. BAUGH	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Krysten Lester, Single Hearing Member
Cause No. C-168937

August 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

On February 19, 2004, Clyde D. Baugh filed an application for adjustment of claim with the Indiana Worker's Compensation Board claiming permanent disablement from injuries suffered while working for Speedway International Trucks (Speedway). A single hearing member determined that Baugh was permanently totally disabled and that Speedway should pay permanent total disability compensation and provide full benefits under the Worker's Compensation Act. Speedway filed for review by the Full Review Board of the Indiana Worker's Compensation Board (the Full Board). After a hearing, the Full Board affirmed the single hearing member's decision, "clarifying" that Baugh is also entitled to future medical care in the form of pain management. On appeal, Speedway contends there was no finding or evidence to support the Full Board's conclusion that Baugh was entitled to future medical expenses for pain management treatment.

We reverse.

The facts as found by the single hearing member and adopted by the Full Board are that Baugh was injured on December 20, 2002 in an accident arising out of and in the scope of his employment with Speedway. He went to the emergency room, where he was diagnosed with wedge deformity of T12 with mild lumbar and thoracolumbar degenerative changes. Beginning December 21, 2002 and continuing through and including January 18, 2007, Baugh received Worker's Compensation temporary total disability benefit payments from Speedway in the amount of $109,109.66. We reproduce here the relevant, and unchallenged, Recitation of Evidence entered by the single hearing member relating to the course of Baugh's medical treatment:

4. Plaintiff was then seen at the Methodist Occupational Health Center by Dr. Wells and Dr. Todd Rowland from December 20, 2002 through April 16, 2003. The course of treatment consisted of physical therapy and pain medications. Dr. Rowland reported that Plaintiff suffered from severe back pain and numbness in his right foot. As early as February 26, 2003 he opined that it was not clear that the Plaintiff would be able to improve.

5. On April 16, 2003 Dr. Rowland found the Plaintiff to be at maximum medical improvement and assigned a 5% permanent partial impairment rating based on the AMA Guidelines with DRE lumbar category II. Dr. Worland also assigned permanent restrictions of lifting no more than 20 pounds, pushing and/or pulling no more than 25 pounds, and no repetitive bending and twisting or stooping.

6. Plaintiff was thereafter seen by Dr. Marshall Poor and Dr. Souheil Haddad at the Neurosurgical Clinic of Bloomington for ongoing pain complaints. On May 15, 2003, Dr. Poor opined that Plaintiff had a compression fracture at T11 or some variant of Scheuermann's disease. Dr. Haddad recommended a T11 kyphoplasty, although he warned Plaintiff that this may not improve his symptoms. Dr. Haddad noted that Plaintiff's symptoms of pain were "very incapacitating".

7. After the Plaintiff underwent surgery June 19, 2003 he temporarily improved, but after undergoing physical therapy he complained of a recurrence of his back pain August 13, 2003.

8. Dr. Haddad opined that Plaintiff reached maximum medical improvement September 19, 2003 and released him to return to work. He assigned restrictions of no repetitive bending, twisting, or reaching up and recommended that Plaintiff be able to stand up and walk around, rest, and sit down fairly frequently.

9. Thereafter, Plaintiff continued to follow up with his family physician, Dr. James Ray who referred him to the Bloomington Hospital and Health Care Systems Advanced Pain Center.

10. Plaintiff treated at the Pain Center with Dr. Lysandrou who reported that Plaintiff had tried muscle relaxants, analgesics, anti-inflammatories, physical therapy, and bed rest for six weeks but continued to have constant pain that was worse with movement, coughing, sneezing, straining, bending, prolonged walking, prolonged

sitting, and prolonged standing. Dr. Lysandrou administered several epidural steroid injections at the T11-T12 level through June 29, 2004.

11. Plaintiff followed up with Dr. Haddad on July 7, 2004 who then referred him to Dr. Tiwari, at the Pain Management Center in Bloomington.

12. Dr. Tiwari diagnosed Plaintiff with peripheral neuropathy and thoracic facet hypertrophy and thoracic facet pain. Dr. Tiwari recommended thoracic facet injections and concluded that Plaintiff would require chronic pain management, physical therapy, and medications to control his pain as well as comorbidities associated with chronic pain.

13. Plaintiff was approved for Social Security Disability September 17, 2004.

14. On September 14, 2004 Dr. Tiwari reported to defendant that Plaintiff was clinically unable to work due to his pain.

15. On April 29, 2005 Dr. Tiwari prescribed an intrathecal pump for the purpose of administering morphine which was inserted by Dr. Haddad May 9, 2005. On May 3, 2006 Dr. Tiwari assigned a permanent partial impairment rating of 35% of the whole person. Dr. Tiwari continues to see Plaintiff for pain management.

16. Plaintiff underwent his first functional capacity evaluation ("FCE") October 31, 2005 and November 2, 2005. The evaluator noted that Plaintiff's functional limitations observed were consistent with his physical impairments and diagnosis. The evaluator opined that Plaintiff's abilities approximated the strength demand for sedentary work except when lifting from floor to waist.

17. On December 19, 2005 Constance Brown, MS, PC issued a vocational report based on her interview with the Plaintiff and a records review. Her conclusion was that Plaintiff could not return to his past work as a mechanic and that he did not have skills that were transferable to work within his documented functional limitations. In a follow up report March 7, 2007, Ms. Brown opined that Plaintiff's restrictions would put him at a sedentary, unskilled level that compromises [sic] less than 1% of the Indiana labor market. Additionally, Ms. Brown opined that Plaintiff's use of narcotic medication on a consistent basis would limit his access to the labor market.

18. On December 15, 2006, Gail Corn, MS, CRC, issued a vocational report based on her interview with the Plaintiff, a records review, and a labor market survey. Ms. Corn listed 11 job categories in Plaintiff's area in the sedentary, exertional level which she opined are with Plaintiff's restrictions, including factory assembler, electronic component assembler, and security guard.

19. On March 26, 2007 plaintiff underwent a final FCE which concluded that Plaintiff was unable to return to his previous job as a mechanic.

20. Defendant very recently arranged for Plaintiff to see Dr. Ronald Bennett for a second opinion. Dr. Bennett issued his report May 8, 2007 which assigned a 28% whole person impairment.

Appellant's Appendix at 65-67. Based upon the foregoing, the single hearing member entered the following award on July 6, 2007:

> **IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT** Plaintiff is Permanently and Totally Disabled due to an accident that arose out of and in the course of his employment on December 20, 2002 and is entitled to maximum compensation and benefits under the Indiana Worker's Compensation Act, including, but not limited to, five hundred (500) weeks of compensation at a rate of $512.94 per week with a credit to Defendant for amounts previously paid to Plaintiff for Temporary Total Disability.

Id. at 68-69.

On July 23, 2007, Speedway filed an Application for Review by Full Board. Following a hearing, the Full Board issued the following decision:

> IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Full Worker's Compensation Board of Indiana that the Single Hearing Member's decision is hereby affirmed *with the following clarifications. The Full Worker's Compensation Board now finds that Plaintiff is entitled to future medical care in the form of pain management to reduce and/or limit his impairment. This includes but is not limited to care needed to maintain Plaintiff's intrathecal pump.*

Id. at 71 (emphasis supplied). Speedway contends the highlighted portion of the above order

is erroneous. Our standard of review in cases such as this is well settled. "'On appeal, we review the decision of the Board, not to reweigh the evidence or judge the credibility of witnesses, but only to determine whether substantial evidence, together with any reasonable inferences that flow from such evidence, support the Board's findings and conclusions.'" *Bertoch v. NBD Corp.,* 813 N.E.2d 1159, 1160 (Ind. 2004) (quoting *Walker v. State*, 694 N.E.2d 258, 266 (Ind. 1998)). The Full Board's conclusions of law are reviewed de novo. *Id.* Here, the single hearing member entered written findings and the Full Board found that the hearing officer's decision should be adopted, although with "clarifications". "Such adoption is sufficient to attribute to the [F]ull [B]oard the explicit written findings of the single hearing member and to permit appellate review accordingly." *Dial X-Automated Equip. v. Caskey,* 826 N.E.2d 642, 644 (Ind. 2005).

Speedway's challenge to the Full Board's decision centers upon a single aspect of the order – an aspect the order itself characterizes as a "clarification[]". *Appellant's Appendix* at 71. We believe it is more accurately viewed as an addendum, in that it does not elaborate on an existing portion of the single hearing member's decision, but rather adds something not contained in the original order. Speedway notes that the order also labels this aspect of the Full Board's decision a finding (i.e., "The Full Worker's Compensation Board now *finds*..."), but contends it functions as a conclusion of law and thus must be regarded and reviewed as such. *Id*. (emphasis supplied). We agree. *See Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002) ("'[w]e are not bound by the trial court's characterization of its results as 'findings of fact' or 'conclusions of law.' Rather, we look past these labels to the substance of the

judgment and will review a legal conclusion as such even if the judgment wrongly classifies it as a finding of fact'") (quoting *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 528 (Ind. 2002)). It is clear to us that the Full Board's "clarification" is neither a clarification nor a finding of fact, but is instead a legal conclusion. Speedway contends, among other things, that this conclusion does not comport with Ind. Code Ann. § 22-3-3-4(c) (West, PREMISE through 2007 1st Regular Sess.), which authorizes an order for treatment "deemed necessary to limit or reduce the amount and extent of the employee's impairment." We agree that the Full Board's conclusion regarding future pain management treatment is unsupported by the requisite ultimate finding of fact and thus erroneous.

In addition to the principles set out above, we employ a two-tiered standard of review in evaluating the Full Board's decision. *Wholesalers, Inc. v. Hobson*, 874 N.E.2d 622 (Ind. Ct. App. 2007). We first review the record to determine if there is any competent evidence of probative value to support the Full Board's findings. Next, we examine the findings to see if they are sufficient to support the decision. *Id*. We reiterate that the Full Board adopted the decision of the single hearing member. Therefore, we examine the evidence recited in the single hearing member's decision as well as the findings and conclusions set out therein, as those constitute the Full Board's decision.

The only evidence set out in the Recitation of Evidence concerning the need for future pain management treatment is found in paragraphs 12, 14, and 15. There, it provides that Dr. Tiwari (1) diagnosed Baugh with peripheral neuropathy and thoracic facet hypertrophy and thoracic facet pain; (2) recommended thoracic facet injections; and (3) concluded Baugh

would require chronic pain management treatment, physical therapy, and medications to control his pain. As a result, Dr. Tiwari reported to Speedway that Baugh was clinically unable to work because of his pain. Approximately seven months later, Dr. Haddad implanted an intrathecal pump for the purpose of administering morphine. Based in part upon this evidence, the single hearing member (and thus the Full Board) entered the following relevant findings of fact:

> 1. Plaintiff's testimony that he continues to suffer from chronic and incapacitating pain, especially with increased activity, is credible. Furthermore, the multiple narcotic medications that he needs to take to control the pain cause drowsiness and difficulty concentrating.
>
> 2. Although Plaintiff is able to use the computer in a home environment, these skills would not be transferable to the labor market due to his inability to sit for long periods at a time without pain or to concentrate for any length of time. Plaintiff credibly testified that he could only sit 15 minutes at a time and could only stand for up to 20 minutes at a time without severe pain.
>
> * * * * *
>
> 4. It is not necessary to determine Plaintiff's permanent partial impairment because any award based on impairment would be subsumed by Plaintiff's award of permanent total disability. However, Dr. Tiwari's report on impairment is found to be highly pertinent due to the fact that he was Plaintiff's treating physician for pain and thoroughly took into account his pain symptoms and need for medications when determining impairment.

Id. at 67-68.

A review of the foregoing reveals there is no finding of fact – either in the original decision of the single hearing member or in the Full Board's "clarifications" – that future treatment for pain management will limit or reduce the amount and extent of the employee's impairment. This omission is significant. In *Mousley v. Curry*, 124 Ind.App. 280, 117

N.E.2d 280 (1954), an employee suffered accidental injuries that arose out of and in the course of his employment. The employee filed a claim for Worker's Compensation benefits. Following a hearing, the Full Board entered judgment in favor of the employee and entered the following relevant findings of fact and conclusions of law:

> (d). That pursuant to said accidental injuries appellee has been confined to Methodist Hospital, Indianapolis, Indiana, and is so confined in said hospital at the date of this hearing.
>
> (e). That appellee 'should be furnished additional hospital, medical, surgical treatment, nurses services and supplies beyond the statutory period fixed by law to limit and reduce the extent of disability or impairment' of said appellee.

Id. at 282. The employer appealed the portion of the award set out in paragraph (e) on grounds that it was not authorized by § 40-1225 of Burns Indiana Statutes Annotated, the predecessor to I.C. § 22-3-3-4(c). That statute read, in pertinent part: "the industrial board may * * * require that treatment by such physician and such services and supplies be furnished by * * * the employer as the industrial board may deem reasonably necessary to limit or reduce the amount and extent of such disability or impairment." This court reversed the award after noting, "There is no finding by the Board that such services would or would tend to 'limit or reduce the amount and extent of such disability or impairment.'" *Mousley v. Curry*, 117 N.E.2d at 282.

We cannot help noting the salient similarities between the relevant facts in *Mousley* and those in the instant case. The statutory requirement (i.e., may receive an award of medical and/or nursing expenses, after an adjudication or award of permanent impairment, so long as it will limit or reduce the amount and extent of impairment; *see Talas v. Correct*

Piping Co., Inc., 435 N.E.2d 22, 26 (Ind. 1982)) is virtually the same in each. Moreover, the challenged finding in *Mousley* was substantially similar to the only "finding" upon which the award in the instant case may be based. As the *Mousley* court noted, "[t]he finding … that the appellee 'should be furnished … services' 'to limit and reduce the extent of the … impairment' is not a finding of the ultimate fact that such services would or would tend to limit or reduce the … impairment." *Mousley v. Curry*, 117 N.E.2d at 283. In the same way, a conclusion that Baugh "is entitled to future medical care in the form of pain management *to reduce and/or limit his impairment*" is not a finding of the ultimate fact that such would in fact limit or reduce his impairment. *Appellant's Appendix* at 71.

In the final analysis, we can see no meaningful distinction between the fatally flawed finding of fact in *Mousley* and the "clarifications" in the instant case. Although we are mindful that it may be argued one might *infer* from the Full Board's clarification that pain management treatment will reduce and/or limit Baugh's impairment, the same can be said of the relevant finding in *Mousley*. Such an inference cannot, by itself, support an award under this provision of I.C. § 22-3-3-4(c). Rather, there must be an affirmative finding that, in this case, pain management treatment will reduce or limit Baugh's impairment. *See Mousley v. Curry*, 117 N.E.2d 280. Absent that, the challenged portion of the Full Board's decision cannot stand.

Judgment reversed.

BAILEY, J., concurs.

KIRSCH, J., dissenting with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

SPEEDWAY INTERNATIONAL TRUCKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0712-EX-1144
	)	
	)	
CLYDE D. BAUGH,	)	
	)	
Appellees-Plaintiff.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Krysten Lester, Single Hearing Member
Cause No. C-168937

KIRSCH, Judge, *dissenting*.

An appellant faces a deferential standard of review when challenging the Board's findings. *Wimmer Temporaries, Inc. v. Massoff*, 740 N.E.2d 886, 888 (Ind.Ct.App.2000), *trans. denied*. When reviewing an appeal from a decision of the Worker's Compensation Board, this court is bound by the Board's findings of fact and may consider only errors in the Board's conclusions of law. *Indiana Michigan Power Company v. Roush*, 706 N.E.2d 1110, 1113 (Ind.Ct.App.1999), *trans. denied*. We may disturb the Board's factual determinations only if we determine that the evidence is undisputed and leads inescapably to a result contrary to the one reached by the Board. *Id*.

Contrary to my colleagues, I find abundant probative evidence in the record to support the Board's award. The claimant testified to his ongoing pain, that his pain management experts recommended pain management through a pain pump, and that his usage of the pain pump was ongoing. Kam Tiwari, M.D., treated Mr. Baugh over the course of three years and wrote repeatedly that the claimant suffers from a chronic back condition that requires management of his pain by means of a morphine pump. (*See* Transcript Exhibits B, E, K, M O, and P). Ronald Bennett, M.D., performed an independent medical examination of Mr. Baugh in 2007 and noted that he has motion-producing pain and was utilizing a pain pump.

The Board's Single Hearing Member found that Dr. Tiwari treated Baugh for ongoing pain and that Baugh needs multiple narcotic medications to control his pain. The Member found Dr. Tiawari's report "to be highly pertinent due to the fact that he was Plaintiff's treating physician for pain and thoroughly took into account his pain symptoms and need for medications when determining impairment." The Board adopted the Single Member's decision with the clarification.

We examine the record only to determine whether there is any substantial evidence and reasonable inferences to be drawn therefrom to support the Board's findings and conclusions. Only if the evidence is of a character that reasonable people would be compelled to reach a conclusion contrary to the decision of the Board will it be overturned. *Perez v. U.S. Steel Corp*., 428 N.E.2d 212, 216 (Ind.1981).

As my colleagues note, it is a reasonable inference that pain management will reduce or limit Baugh's impairment. *Slip Opinion,* p. 10. To the extent that a panel of this court

failed to draw such an inference fifty-four years ago in similar circumstances in *Mousley v. Curry*, 124 Ind. App. 280, 117 N.E.2d 280 (1954) says only that we should now decline to follow its holding.

I also part ways with my colleagues regarding the relief that they order. To me, there is probative evidence to support the Board's award. If the findings are insufficient, the proper remedy is to vacate and remand for findings that do contain the requisite specificity to permit meaningful appellate review. *See Van-Scyoc v. Mid-State Paving*, 787 N.E.2d 499, 501 (Ind. Ct. App. 2003)

Believing that the evidence supports the award as clarified, I respectfully dissent.